Supreme Court, U.S.
FILED
SEP 19 1985
JOSEPH F. SPANIOL, JR.
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NO. 85-272

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ARROW NORTHWEST, INC., A TEXAS CORPORATION, JIM ANDERSON, SANDRA H. ARNOLD, ERWIN J. SUSMAN, CAROL ANDERSON, MARGO A. RUSS, MATT CLASEN, JOHN WILLIAM ALSUP, MARGARET ALSUP, J. GRADY ORR, WENDEL M. RUSS, J. F. (PEPE) BACHOR, ELLIS C. FANCHER, ROBERT C. GREEN AND KATHRYN JACOBS,
Petitioners

v.

GREATER HOUSTON TRANSPORTATION COMPANY D/B/A YELLOW CAB COMPANY AND THE CITY OF HOUSTON,
Respondents

BRIEF OF RESPONDENT THE CITY OF HOUSTON IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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September 17, 1985

Alpha Law Brief Co., Inc.—5606 Parkersburg—Houston, Texas 77036—223-3003

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20 pp

QUESTION PRESENTED

Whether the Fifth Circuit Court of Appeals correctly applied *Town of Hallie v. City of Eau Claire*, ____U.S. ____, 105 S. Ct. 1713 (1985), in holding that the actions of the City of Houston in passing sections 45.10-1 and 45.10-2 of the Houston, Tex. Code of Ordinances, which prohibit a taxi from picking up passengers at Houston Intercontinental Airport unless the taxi is operated pursuant to a concession agreement with the City, and in entering into such a concession agreement with Greater Houston Transportation Company ("Yellow Cab"), were undertaken pursuant to a clearly articulated and affirmatively expressed state policy to replace competition with regulation?

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STATUTES INVOLVED

In addition to the statutes set forth in the Petition, this case involves sections 16 and 21 of Tex. Rev. Civ. Stat. Ann. art 1175 (Vernon 1975), which are set forth in the Appendix to this Brief.

STATEMENT OF THE CASE

This lawsuit arises out of a concession agreement between the two Respondents which grants Greater Houston Transportation Company d/b/a Yellow Cab Company ("Yellow Cab") the right to pick up passengers at Houston's city-owned and operated Intercontinental Airport. The Petitioners are taxicab drivers and corporations who contend that the action of the City of Houston ("the City") in entering into the concession agreement violates sections 1 and 2 of the Sherman Act.[1]

The challenged concession agreement with Yellow Cab was entered into pursuant to sections 45-10.1 and 45-10.2 of the Houston, Tex. Code of Ordinances. Section 45-10.1 limits taxis picking up passengers at the airport to those operating under a concession contract with the City, and specifies certain charges applicable to all cabs picking up passengers at the airport. The concession agreement requires Yellow Cab to provide dispatchers at the airport in order to ensure orderly taxi flow and to guarantee continuous taxi service at the airport. The ordinance and contract were a result of the City's efforts to cope with the problems with airport taxi service which accompanied the opening of the airport in 1969, including "chaotic" taxicab operating conditions and "an extreme paucity of taxicab service for passengers arriving at night and in early morning hours." Petitioners' App. B at 2.

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1. The agreement was amended in 1980 to require Yellow Cab to permit other taxidrivers to subcontract with it on a nondiscriminatory basis. Petitioners' App. B at 3. Although before 1980 the agreement did not on its face provide for exclusivity, the court of appeals and the trial court assumed *arguendo* that it was exclusive. Petitioners' App. A at 2 n.1.

After an extensive opportunity for discovery, and on a record that Petitioners agreed was complete as to the issues raised, the trial court granted summary judgment to the City and to Yellow Cab. Petitioners' App. B. The court held that the City's actions were not covered by the antitrust laws under the state action immunity doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), as further explicated in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), and *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982). As for the claims against Yellow Cab, the court granted summary judgment on the antitrust claims on the grounds of *Noerr-Pennington* immunity and exercised its discretion to dismiss the pendent state law claims without prejudice.

The Fifth Circuit Court of Appeals affirmed the trial court's ruling. *Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co.*, 760 F.2d 607 (5th Cir. 1983), Petitioners' App. A. Assessing the City's actions under this Court's recent ruling in *Town of Hallie v. City of Eau Claire*, ____U.S.____, 105 S. Ct. 1713 (1985), the court of appeals concluded the City's actions qualified for *Parker* immunity on two independent grounds: the authorization (1) of taxicab regulation contained in Tex. Rev. Civ. Stat. Ann. art. 1175 (Vernon 1963), and (2) of airport regulation in Tex. Rev. Civ. Stat. Ann. art. 46d-1, *et seq.* (Vernon 1969). The court of appeals also ruled that Yellow Cab's contract with the City, resulting as it did from a "valid municipal and . . . state policy" was protected by *Noerr-Pennington*. Petitioners' App. A at 12.

REASONS FOR DENYING THE WRIT

Petitioners' principal contention is that the Fifth Circuit erred in its interpretation of the Texas statutes and Constitution in concluding that the City's challenged action was taken pursuant to a clearly articulated and affirmatively expressed state policy. Conceding, as they must, that *Town of Hallie* settled the legal standards for the state action exemption to apply—a standard they vigorously challenged in the Fifth Circuit—they here can take issue only with the Fifth Circuit's reading of the Texas law. They argue that the appeals court should have found a state policy prohibiting the City's regulation of taxicabs at the airport in the Texas Constitution and in the Municipal Airports Act, Tex. Rev. Civ. Stat. Ann. art. 46d-1, *et seq.* (Vernon 1969). Not only are Petitioners in error in their reading of Texas law, the issue they raise does not meet any criteria for consideration by this Court.

Petitioners also contend that the Fifth Circuit erroneously held that municipal action may qualify for *Parker* immunity even though not taken pursuant to an affirmatively and unambiguously expressed state policy, if the municipality has not unreasonably exercised its regulatory authority. Petitioners simply misread the appellate court's opinion, which expressly relies on the *Town of Hallie* standard. Indeed, the City has never suggested that a mere exercise of regulatory authority suffices for the state action exemption to apply. The focus of the argument before the Fifth Circuit instead was on Petitioners' various attempts to avoid the standard enunciated in *Town of Hallie* and on the City's support of the *Hallie* test. The Fifth Circuit correctly required that the City establish the requisite state regulatory policies under *Town of Hallie*.

I. THE CITY'S REGULATION IS WITHIN THE STATE ACTION EXEMPTION.

A. The antitrust laws do not apply to municipal regulations resulting from a clearly articulated and affirmatively expressed state policy.

The Sherman Act does not reach acts of the states as sovereigns, *Parker v. Brown*, 317 U.S. 341 (1943), nor does it reach the acts of municipalities undertaken pursuant to delegation of authority by the states. This Court has most recently examined the latter aspect of the *Parker* doctrine in *Town of Hallie v. City of Eau Claire*, ___ U.S.___, 105 S. Ct. 1713 (1985). In *Town of Hallie*, four unincorporated Wisconsin townships challenged the nearby City of Eau Claire's policy to provide sewage treatment services to adjoining landowners only if they agreed to become annexed by the city. The Court held that the city's actions fell within the state action immunity doctrine, despite the inability of the city to point to a specific state statute authorizing the use of monopoly power over sewage treatment to require annexation. The Court reiterated its prior statement in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), that the doctrine is applicable whenever the state legislature has "clearly articulated and affirmatively expressed [a] state policy to displace competition with regulation." *Id.* at 1719. The Court rejected the argument that the state legislature must say explicitly that it expected the city to engage in conduct that would have anticompetitive effects. Rather, it would be enough that "anticompetitive effects logically would result from [the] broad authority to regulate." *Id.* at 1718. The Court also held that, while state compulsion may best evidence state policy, it is not

a prerequisite, and active state supervision is not required of municipal regulators. *Id.* at 1720. Thus, the Wisconsin statute authorizing the city to fix the limits of its utility service and expressly providing that the city "shall have no obligation to serve beyond the area so delineated" was sufficient authorization for the city to condition any service beyond its territorial jurisdiction upon annexation.

B. The Municipal Airports Act and Article 1175 contain the clearly articulated and affirmatively expressed state policy required by *Town of Hallie*.

The court of appeals correctly held that two independent state policies are effectuated by sections 45.10-1 and 45.10-2 of the City Ordinances and the concession agreement. First, the State has delegated to the City authority to regulate extensively the taxicab business, and, as contemplated by the State, this regulation has displaced competition; second, the Municipal Airports Act authorizes and contemplates the arrangements made by the City.

The City regulates the taxicab business under the express delegation of such authority by the State. Article 1175 expressly provides that the City has exclusive dominion, control and jurisdiction over the public streets and may prohibit the use of any street in the City. Tex. Rev. Civ. Stat. Ann. art. 1175(16) (Vernon 1963). Further, the City may

> regulate, license and fix the charges or fares made by any person owning, operating or controlling any vehicle of any character used for the carrying of passengers for hire or the transportation of freight

> for hire . . . on the public streets and alleys of the city.

Tex. Rev. Civ. Stat. Ann. art. 1175(21) (Vernon 1963). Pursuant to this plenary statutory authority, the City has extensively regulated the taxicab business. The actions of which plaintiffs complain are part and parcel of the City's overall regulatory activity, the general need for which is not contested. In effect, the regulation at issue is no different from the City's control over taxicab rates governing trips from the airport. The City does not engage in illegal price fixing when it sets these prices, and likewise, the City did not illegally restrain trade when it passed the ordinance and granted the concession in question. The City may, consistent with the federal antitrust laws, establish airport rates that are unattractive to cab owners or that seem grossly unfair or unwise. The antitrust laws are not a panacea for injury caused by such regulation, which is clearly contemplated by state law.

Second, in addition to the extensive powers provided the City to regulate the taxicab business per se, the City has been authorized to establish and operate a municipal airport, such as Houston Intercontinental. Municipal Airports Act, Tex. Rev. Civ. Stat. Ann. art. 46d-1, *et seq.* (Vernon 1969). Article 46d-4 specifically authorizes granting contracts for the provision of goods and services at airports:

> (a) . . . In operating an airport . . . such municipality may . . . enter into contracts . . . and other arrangements for a term not exceeding forty (40) years with any persons:
>
> . . .

(2) conferring the privilege of supplying goods, commodities, things, services or facilities at such airport . . . ;

. . . .

In each case the municipality may establish the terms and conditions and fix the charges, rentals or fees for the privileges or services.

Tex. Rev. Civ. Stat. Ann. art. 46d-4 (Vernon 1969).[2]

Both statutes embody the Legislature's intent that municipal regulation of an airport and of the taxi business be "state action," and each, independently, supplies adequate authority for the City's actions. They show the State's decision (1) in the case of the taxicab business, to adopt economic regulation in the place of competition and (2) in the case of municipal airport operation, to adopt regulated public service. Considered together, they leave no doubt that the challenged restraint results from clearly articulated and affirmatively expressed state policy.

C. No contrary state policy prohibiting airport regulation is found in the Municipal Airports Act or the Texas Constitution.

Petitioners apparently do not contest that the regulatory features of the two statutes, if standing alone, would evidence the requisite state policy and would satisfy the state action immunity test of *Town of Hallie*. They do argue, however, that the regulatory features do not stand alone, because a stronger policy inconsistent with regulation is elsewhere expressed in the Municipal Airports

2. Not surprisingly, the Texas courts have recognized that the ordinance at issue here is authorized by the Municipal Airports Act. *See Bellew v. City of Houston*, 456 S.W.2d 185, 187 (Tex. Civ. App. —Houston [1st Dist.] 1970, writ ref'd n.r.e.).

Act and in Texas' Constitution. Petition at 12-15 & 17-19.[3]

First, relying upon *Woolen v. Surtran Taxicabs, Inc.*, 461 F. Supp. 1025 (N.D. Tex. 1978),[4] Petitioners contend that Article 46d-7(b) of the Municipal Airports Act, which provides that no action undertaken by a municipality pursuant to it should be in violation of an act of Congress, evidences an intent that cities comply with the federal antitrust laws.

The short answer to Petitioners' contention is that independent authorization of the City's regulation at issue here is contained in Article 1175, which expressly authorizes the City to regulate taxicabs. A longer answer to Petitioners' argument is that their construction of the Municipal Airports Act is wrong. The argument ignores the Act's explicit authorization of contracts with suppliers of services, which in itself necessarily implies exclusion of some from the airport, and reads too much into a provision that the *Woolen* court admitted was not free from doubt. 461 F. Supp. at 1031. It simply is not reasonable to conclude that the legislature intended the federal antitrust laws to circumscribe the City's regulation of airport operations. It is far more likely that the legislature intended to prevent any conflict with the extensive federal regulation of commercial aviation, than it is to assume that the power the Texas

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3. Petitioners characterize the question as whether "implied" legislative intent or state policy is of a lesser order than "express" intent or policy. Petition at 6, 12-15, 17-19. The true question to be decided is whether the legislature did or did not intend to displace competition with regulation.

4. In view of the Fifth Circuit's holding in this case the *Woolen* court has since dismissed the plaintiffs' antitrust claims. *Woolen v. Surtran Taxicabs, Inc.*, Nos. CA-3-78-609, CA-3-78-745 (N.D. Tex. Aug. 8, 1985) (available on Lexis).

Legislature gave to municipalities with one hand was taken away by the other.[5] The only way to reconcile Article 46d-15's recognition that operation and regulation of an airport are governmental functions with Article 46d-7(b) is to conclude that the legislature intended municipal acts to be "state action" but directed cities not to encroach on areas of federal aeronautical regulation.

Petitioners also argue that authorization of the regulation under the airport and taxicab statutes is inconsistent with Article I, Section 26 of the Texas Constitution. They rely for this proposition on *City of Brenham v. Brenham Water Co.*, 67 Tex. 542, 4 S.W. 143 (1887), in which the Texas Supreme Court held that the Texas Constitution prohibits monopolies created by state political subdivisions that give a person an exclusive right to buy, sell, or make a thing or to pursue a designated employment. The Supreme Court went on to observe, however, that not all exclusive privileges are monopolies. 4 S.W. at 153 ("There are, however, certain classes of exclusive privileges which do not amount to monopolies."). One such class of exclusive privilege, which has been consistently recognized by Texas courts, includes those granted only upon the property or premises of the grantor. *State v. Gulf Refining Co.*, 279 S.W. 526 (Tex. Civ. App.—Austin 1925, writ ref'd), cited with approval in *Schnitzer v. Southwest Shoe Corp.*, 364 S.W.2d 373,

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5. Even Petitioners acknowledge that their interpretation requires the Court to give an internally inconsistent reading to the statute when they argue that "the very statute that *authorized* the City to enter into a taxicab concession agreement expressly directs the City not to engage in any conduct which would be in violation of any Act of the Congress of the United States [including] . . . the federal antitrust laws." Petition at 12 (emphasis added). Moreover, the relevant question is whether the antitrust laws apply to the City, not whether it has violated them.

374 (Tex. 1963). *See also Lewis v. Weatherford, M.W. & N.W. Ry.*, 36 Tex. Civ. App. 48, 81 S.W. 111 (1904, writ ref'd); *Clisbee v. Chicago, R.I. & G. Ry.*, 230 S.W. 235 (Tex. Civ. App.—Fort Worth 1921, writ ref'd). For this reason, a Texas court of civil appeals has held in a case strikingly similar to this one that a city's grant of an exclusive contract for ground transportation service at a city-owned airport is not a prohibited monopoly under the Texas Constitution. *Airport Coach Service, Inc. v. City of Fort Worth*, 518 S.W.2d 566, 572 (Tex. Civ. App.—Tyler 1974, writ ref'd n.r.e.). This Texas decision construing the state constitution, which is squarely in point, is controlling here.[6] *See Continental Bus System, Inc. v. City of Dallas*, 386 F. Supp. 359, 365-66 (N.D. Tex. 1974).

II. THE FIFTH CIRCUIT EXPRESSLY AND CORRECTLY UTILIZED *TOWN OF HALLIE* IN UPHOLDING THE AIRPORT REGULATION.

Petitioners read the Fifth Circuit's opinion to hold that municipal action may qualify for *Parker* immunity even though "not done pursuant to clearly articulated and affirmatively expressed state policy if the municipality has not unreasonably exercised its authority granted to it by the State." Petition at 17. They assert that the Fifth Circuit's ruling in this regard does not comport with *Town of Hallie* because it permits consideration of an alternative

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6. Petitioners also rely upon a contrary interpretation by the Arkansas Supreme Court of an identical Arkansas constitutional provision. Petition at 19. It should be needless to say that the Arkansas Supreme Court's interpretation of its own constitution carries no weight in the face of a different interpretation by a Texas appeals court of the Texas Constitution.

factor to the "clearly articulated and affirmatively expressed state policy" required by *Town of Hallie*. Petition at 16-17.

The statement in the Fifth Circuit's opinion that Petitioners refer to is the following:

> Texas has delegated the management of both private paid carriers and airports to the state's municipalities through statutes expressly directed toward these ends. We know that the Supreme Court has not granted full license to the states to confer monopoly status with a magical pass of the legislative wand. But where a state has to this extent articulated a policy [of] regulatory deference to its municipalities, and where a city has not unreasonably exercised its authority, the city's actions are not subject to the constraints of federal antitrust law.

Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co., 760 F.2d at 611, Petitioners' App. A at 9 (citation deleted). Assuming arguendo that the Fifth Circuit viewed the "not unreasonable exercise" by a municipality of its state-granted regulatory authority as a prerequisite to claiming *Parker* immunity, it is plain from the quoted passage that the Fifth Circuit viewed this prerequisite *as additional to* the prerequisite of a "clearly articulated and affirmatively expressed state policy," not as an alternative to such a policy. The City, by demonstrating both, has thus fully satisfied *Town of Hallie*.[7] If the Fifth Circuit has imposed additional requirements, it has not done so in a manner harming Petitioners.

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7. Petitioners undoubtedly read too much into the Fifth Circuit's opinion. It is likely that the court merely intended to reserve for a later day the question whether an unreasonable exercise of authority clearly granted to a municipality by the state would qualify for *Parker* immunity.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

Tex. Rev. Civ. Stat. Ann. art. 1175 (16) (Vernon 1963):

To have exclusive dominion, control, and jurisdiction in, over and under the public streets, avenues, alleys, highways and boulevards, and public grounds of such city and to provide for the improvement of any public streets, alleys, highways, avenues or boulevards by paving, raising, grading, filling or otherwise improving the same and to charge the cost of making such improvement against the abutting property, by fixing a lien against the same, and a personal charge against the owner thereof according to an assessment specially levied therefor in an amount not to exceed the special benefit any such property received in enhanced value by reason of making such improvement, and to provide for the issuance of assignable certificates covering the payments for said cost, provided that the charter shall apportion the cost to be paid by the property owners and the amount to be paid by the city, and provided further, that all street railways, steam railways, or other railways, shall pay the cost of improving the said street between the rails and tracks of any such railway companies and for two feet on each side thereof. The city shall have the power to provide for the construction and building of sidewalks and charge the entire cost of constructing of said sidewalks, including the curb, against the owner of abutting property, and to make a special charge against the owner for such cost and to provide by special assessment a lien against such property for such cost; to have the power to provide for the improvement of any such sidewalk or the construction of any such curb by penal ordinance and to declare defective sidewalks to be a public nuisance. The power herein granted for making street improvements and assessing the cost by special assessment in the manner herein stated shall not be construed to prevent any city from adopting any other method or plan for the improvement of its streets, sidewalks, alleys, curbs, or boulevards, as it may deem advisable by its charter.

Tex. Rev. Civ. Stat. Ann. art 1175 (21) (Vernon 1963):

To regulate, license and fix the charges or fares made by any person owning, operating or controlling any vehicle of any character used for the carrying of passengers for hire or the transportation of freight for hire on the public streets and alleys of the city.